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In the Supreme Court of the State of Utah

PETER M. LOWE,
Special Administrator of Estate
of T. O. Nelson

Plaintiff and Appellant

— vs. —

MAX ROSENLOF, and
MAX ROSENLOF
CONSTRUCTION CO.,
a partnership

Defendant and Respondent

Case
No. 9348

FILED

SEP 8 1960

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF CASE

In this case the plaintiff, T. O. Nelson, is deceased but to assist in the clarity of this presentation the word “plaintiff” shall mean “T. O. Nelson.”

On or about March 3, 1958, the plaintiff and defendant executed a written subcontract agreement (copy at-

tached to the complaint) by which the plaintiff, as a subcontractor, undertook to do essentially all of the forming and placing of all concrete for the Lehi High School Building for which the defendant as "General Contractor" had been awarded the general contract by the Alpine School District as "Owner." The plaintiff entered into the performance of this contract immediately and to get money for the "move on" costs the plaintiff borrowed \$1,000.00 from Geneva Rock Products Company, and the defendant cosigned the note with the plaintiff.

The work progressed until September 10, 1958, when the defendant was excluded from the job site by the defendant and plaintiff's foreman was fired and the rest of his employees were put on defendant's payroll. The defendant alleged that plaintiff had "abandoned" the job. The lower court found that plaintiff had abandoned the job.

On or about September 16, 1958, the defendant through his attorney notified plaintiff that he was taking over the cement work pursuant to paragraph three of the subcontract. On or about September 25, 1958, the plaintiff through his attorney demanded the return of all his tools, concrete forms, and materials from the defendant and controverted defendant's claim of abandonment.

The plaintiff filed an action in the District Court of Utah County against the defendant and upon the issues made the matter was tried and the court found that the defendant had converted the plaintiff's tools, forms, equipment and materials. The court also found that de-

fendant was entitled to certain offsetting charges which had the effect of giving a judgment to the defendant.

The plaintiff filed his motions for new trial, or to reopen the case to present evidence of value of his forming equipment, and to amend the findings of fact and conclusions of Law and Judgment. The lower court denied plaintiff's motions, and plaintiff now prosecutes this appeal.

STATEMENT OF POINTS

POINT I

THE COURT ERRED BY ITS FAILURE TO GIVE FORCE AND EFFECT TO THE WRITTEN CONTRACT OF THE PARTIES.

POINT II

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF VALUE OF THE FORMS CONVERTED BY DEFENDANT AND THE COURT ERRED IN ITS REFUSAL TO EITHER REOPEN THE CASE OR AMEND ITS FINDINGS.

POINT III

THE PREPONDERANCE OF THE EVIDENCE DOES NOT SUPPORT THE FINDING OF THE COURT THAT PLAINTIFF ABANDONED HIS CONTRACT BUT CONTRARYWISE THE EVIDENCE SHOWS THAT PLAINTIFF WAS FORCED OFF THE JOB BY DEFENDANT.

ARGUMENT

POINT I

THE COURT ERRED BY ITS FAILURE TO GIVE FORCE AND EFFECT TO THE WRIT- TEN CONTRACT OF THE PARTIES.

The particular items in the Findings of Fact and Conclusions of Law involved in this point are contained in paragraph six and totals \$7,569.00 for work allegedly done by the defendant and covered in plaintiff's subcontract, to wit:

| | |
|------------------------------------|------------|
| Creative Terrazzo | \$ 178.00 |
| Crane Rental | \$3,588.50 |
| Columns and beams in pan area..... | \$2,251.50 |
| Beams in administrative area | \$1,551.00 |

In paragraph one of the Subcontract Agreement it is stated "The Contractor and the Subcontractor agree to be bound by the terms of the prime contract agreement, construction regulations, general conditions, plans and specifications, and any and all other contract documents, if any there be, insofar as applicable to this subcontract agreement . . ." Plaintiff's Exhibit Two is the "Specifications Senior High School Alpine School District, American Fork, Utah." Article Two, paragraph D of these "Specifications" makes the general conditions apply to "subcontractors" with equal force; then in Article Thirty-Seven there are specific provisions which govern the relationship of the contractor and subcontractor, and puts the duty upon the contractor to do certain things in respect to his subcontractors. In this

connection Article 37 D (8) provides: "No claim is valid (against the subcontractor by the contractor) unless submitted in writing within the first 10 days of the next month after the work is done."

The almost obvious purpose for such a provision in the contract is to prevent the contractor from "trapping" the subcontractor by accumulated claims at a time when all evidence is gone and the opportunity of proving or disproving such a claim is practically impossible. The General Contractor in a large construction job such as this is in a superior position, and as a substantial and solid protection to the subcontractor the contract provided that *No Claim* should be valid unless submitted in writing at the time when the facts were available to both sides.

The defendant admitted at trial that he had not billed the plaintiff for any of the items set out above until 10 days before the trial of this case (TRS 143, l. 15-20) which was approximately fourteen months after the alleged work was done. In fact, the defendant did not include the items set out under this point in his counter-claim filed in this case, the items appearing only at the very time of trial.

The importance of this provision has particular significance in respect to the crane work because the contract provides in paragraph one, "The General Contractor shall be responsible for the following:

1. Excavation to grade lines, pumping water from forms, furnishing of a crane or other suitable

means of elevating concrete to forms where necessary above finished floor.”

The term “finished floor” has no particular certain meaning because the building has finished floors at every level (TRS 57, l. 23-25; p. 59, l. 6-12; p. 141, l. 27; p. 142, l. 19), and the contract meaning must be interpreted. Thus without receiving any crane billing from the defendant the plaintiff did not know that the defendant was accumulating such a charge under his own interpretation of the contract language. Also, in respect to the forming in the pan area and administration area, the plaintiff testified that these areas were formed by the defendant as an exchange of work and in payment by defendant for the use of the plaintiff’s equipment (TRS 96, l. 24-30; TRS 97, l. 1-16). Again this alleged work was not billed to the plaintiff at any time, and did not appear in the counter claim of the defendant until a few days before trial which was at least 14 months after the work was performed.

By definition a contract is “An agreement or obligation enforceable by law to do something or to refrain from doing something” (17 C.J.S. 1) and further, “A contract must be construed as a whole and, whenever possible, effect will be given to all its parts,” and “writings which are made a part of a contract by annexation or reference must be so construed,” and, “plans and specifications, if not contained in the contract itself, but referred to therein or annexed thereto, must be construed therewith.” (17 C. J. S. 327).

In the case of *Anderson v. Great Eastern Casualty Company*, 168 P. 966, 5- U. 78, this court said:

“A court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language, but will enforce or give effect to the contract according to its terms.”

And again in the case of *Middleton v. Evans*, 45 P. 2d 570 86 U. 396, this court said:

“The intention of the parties is to be deduced from the language employed by them, and the rule making the terms of the contract conclusive where unambiguous is controlling.”

The provisions of the contract contained in Article 37-d-(8) are unambiguous and mandatory in its phrasing that no claim shall be valid unless submitted in writing within the first 10 days of the next month after the work is done.

POINT II

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF VALUE OF THE FORMS CONVERTED BY DEFENDANT AND THE COURT ERRED IN ITS REFUSAL TO EITHER REOPEN THE CASE OR AMEND ITS FINDINGS.

The court made a finding that the defendant had converted the forms of the plaintiff in March, 1959, and that they had a value of \$4,000.00 at the time of conversion. The value of \$4,000.00 came from the unsupported testimony of the defendant (TRS 138, l. 27-30).

In Exhibit 4, the plaintiff set out the invoices covering the actual acquisition cost of the forms converted which totals \$17,707.49. Then using the tabulation set out in paragraph 2 (c) of plaintiff's first answer to interrogatories the plaintiff showed that the first forms purchased cost \$37.80 each for a 2' x 8' panel and that the last 2' x 8' panels purchased (some seven thousand dollars' worth purchased especially for the Lehi High School job), cost in excess of \$57.00 each (See Exhibit 4) (TRS 21, l. 21-30, also p. 22, 23, 24, and 25, l. 1-8). The plaintiff then went on to establish the average "value" of the large panels at \$45.00 and the filler panels at their acquisition cost, thus totaling \$20,071.85. It also appears in the evidence, and is not controverted, that these particular prefabricated concrete forms had a life of one thousand "pours," and that on the Lehi job it would require from ten to not to exceed sixteen "pours" to complete the job (TRS 72, l. 26-30; 73, l. 1-29). Thus the new forms purchased at the start of the Lehi job would have only been used for about sixteen pours whereas their expected life would be one thousand pours.

The defendant in his argument to the trial court and in his memorandum brief took the position that the plaintiff could not recover for the converted forms because he had failed to prove a "Market Value" on the forms citing *Haycroft v. Adams*, 82 U. 347, 24 P. 2d 1110, and *Knighton v. Manning*, 84 U. 1, 33 P. 2d 401, as authority. If the plaintiff's evidence is insufficient because it was not of such a nature as would support a deduction as to what the market value of the forms was, then the defendant's

evidence was totally insufficient to support the court's finding of a \$4,000.00 value. The only evidence produced by the defendant as to value is his totally unsupported statement found on page 138 of the transcript, line 30, as follows:

“I would not appraise them over \$4,000.00.”

In the later case of *Lynn v. Thompson*, 112 U. 24, 184 P. 2d 667, this court said:

“The acceptance by the court of the cost of the tubes to the plaintiff may have been a recognition of the fact that such cost closely approximated the present market price of such pipe; or he may have merely accepted that cost as the most equitable, and reliable way of fixing the amount of the damages suffered. In either case his actions were proper.”

In the case at bar the plaintiff produced cost invoices (a clear reflection of market price) to the time when the Lehi School job started (March 1958) which shows the market price almost doubling in the period of three years. The defendant testified that the average value of the large panels was \$45.00 each and that the filler panels were the same value as their cost since these items were two to three years old. Certainly the evidence is sufficient from which a “Market Value” could be deduced.

At this point in the proceedings below when the court had chosen to adopt the statement of the defendant as to the value of the forms converted, the plaintiff filed his motion, supported by affidavits, to amend the Findings of the Court or to reopen for the purpose of producing

additional evidence as to damages for the conversion. The denial of plaintiff's motion to amend or to reopen constitutes an error of law and should not stand.

POINT III

THE PREPONDERANCE OF THE EVIDENCE DOES NOT SUPPORT THE FINDING OF THE COURT THAT PLAINTIFF ABANDONED HIS CONTRACT BUT CONTRARYWISE THE EVIDENCE SHOWS THAT PLAINTIFF WAS FORCED OFF THE JOB BY DEFENDANT.

At the outset of the subcontract the defendant knew that plaintiff did not have any working capital and thus cosigned with him to obtain \$1,000 from Geneva Rock Products Co. (TRS 149 l. 11-217). The defendant knew that plaintiff would incur large initial costs on the job which would be spread over the entire job. Defendant also knew that plaintiff must have his payments promptly for work completed.

The defendant asserted no right to hold back money and computed the amount due to plaintiff on the basis of \$10.00 per cubic yard of concrete poured (TRS 149, l. 22-28). The plaintiff stated that the basis of payment was to be at the rate of \$10.00 per cubic yard and that there would not be any hold back (TRS 62, l. 21-28).

The contract between the parties required the defendant to promptly pay the plaintiff-subcontractor his proportion of each estimate submitted by the contractor to the Aipine School District (See Exhibit 2 "General

Conditions'' Article 37-D-1). Plaintiff's Exhibit 10 is the monthly "completion certificates" executed by Max Rosenlof and approved by the Inspector, Mr. Chatfield, and the Architect, Fred W. Needham. To determine the proportion of plaintiff's work, Item 46, "Concrete and Forming," has been extracted and the percentage relationship of each monthly estimate to the total contract price has been computed and the percentage figure applied arithmetically to the amounts mentioned in the subcontract. Thus, for example: The Total contract price for "Concrete and Forming" was \$156,056.00; the estimate submitted for the work done by the end of September, 1958, was \$134,220.00; 134 over 156 equals 86%; thus the defendant certified that 86% of the concrete and forming had been completed, and therefore the plaintiff was entitled to 86% of his contract price at that time. The complete computation is set out below:

| <u>Work done per certificate</u> | <u>% Ratio</u> | <u>Contract Price \$51,000</u> | <u>Total Contract \$56,820.00</u> |
|-----------------------------------|----------------|------------------------------------|---------------------------------------|
| March '58, 15,000/156,000..... | 09.61% | \$ 4,896.00 | \$ 5,454.72 |
| April '58, 35,800/156,000..... | 22.94% | 11,679.00 | 16,477.00 |
| May '58, 67,000/156,000..... | 42.94% | 21,930.00 | 24,435.00 |
| June '58, 83,800/156,000..... | 53.84% | 27,540.00 | 30,682.28 |
| July '58, 105,000/156,000..... | 67.30% | 34,170.00 | 38,086.40 |
| August '58, 120,000/156,000..... | 76.923% | 39,270.00 | 43,861.40 |
| September '58, 134,000/156,000 | 86.01% | 43,860.00 | 47,865.20 |
| October '58, 141,000/156,000..... | 90.384% | 45,900.00 | 51,138.00 |
| November '58, 143,000/156,000.. | 92.307% | 46,920.00 | 52,274.40 |

The defendant asserted that he was not holding back any payments and that he was making payments based upon \$10.00 per cubic yard poured. On Sept. 10, 1958, it has been established that 4367 cubic yards had been poured. Upon the basis of the contract and the admitted policy of the defendant under the contract the plaintiff

was entitled to at least \$43,670.00 by September 10, 1958, and upon the basis of the entire job he was entitled to \$47,865.20. The defendant had received the money from the School Board and was obligated to pay plaintiff. The total amount that had been paid to plaintiff by the end of September, 1958, was \$35,040.00, thus leaving \$8,630.00 due under the most conservative construction of the contract between the parties. The total amount of obligation of the plaintiff on the job at this time was \$5,904.39, which included "snap ties" sufficient to finish the entire job and capital items of lumber totaling \$670.00 (see stipulated unpaid bills).

The defendant knew that the plaintiff needed prompt and full payment of the amounts due to him in order to keep up with the high cost of the first part of the job. The defendant alleges that there was a critical situation and that the creditors were closing in on the plaintiff, however, all of the bills which were unpaid at the time when the plaintiff was excluded from the job remained unpaid at the time of trial.

If the defendant had paid the plaintiff as he said he would do and as required by the contract, there would not have been any stress. The preponderance of the evidence establishes the fact that plaintiff was forced off the job. Plaintiff's men, foreman, materials and equipment were on the job when defendant commandeered them. All the evidence supports the contention of a forceful taking by defendant based upon an excuse fabricated and created by defendant's own failure to pay plaintiff as promised and required.

The majority of the work remaining to be done when defendant took over was flat work which is low cost and high profit work. It is the work in which the subcontractor usually has his profit. The defendant said that his estimated cost to form and pour the remaining concrete was \$4.45 per cubic yard (TRS 149, l. 3-6; p. 152, l. 10).

In connection with the completion of the work by defendant it is to be noted that defendant asserted a right to take over pursuant to the provisions of paragraph three of the Subcontract Agreement. This paragraph requires that defendant "complete the work . . . in the most economical manner available to him at the time." At the time plaintiff was excluded from the job the work was approximately 85% completed (see Exhibit 10) and the evidence is to the effect that plaintiff had enough lumber and shap-ties on the job to complete the contract (TRS 45, l. 29-30; 46, l. 1-14; 42, l. 21-30; 43, l. 1-7). The total lumber purchased by the plaintiff was \$2815.51 (TRS 15, l. 4-16) for 85% of the job. However, defendant claimed that he bought \$3820.00 worth of lumber to complete 15% of the job (TRS 137, l. 27-30; 138, l. 1-7) and that it was all totally consumed. The plaintiff and his witnesses asserted that very little of the lumber is consumed by the framing and pouring process but that the majority could be used over and over (TRS 12, l. 17-30; 13, l. 1-3; 45, l. 2-4).

The evidence in this case clearly preponderate in favor of the plaintiff's contention that he was wrongfully excluded from the job and that the alleged purchase of materials by the defendant was not necessary to com-

plete the concrete work but must have been for other uses on the general construction job.

CONCLUSION

The finding of the court in paragraph 6 should be reversed and the specific provisions of the contract making such claims invalid should be enforced.

The finding of the court as to the value of the forms converted should be reversed and a new finding made that said forms were of the value of \$20,071.85, or, in the alternative the case should be remanded for further trial on the question of value.

The allowance by the court of the cost of materials to complete the job in the amount of \$3820.00 should be reversed.

Respectfully submitted

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